Supreme Court, U.S.
FILED
OCT 20 1995
OFFICE OF THE CLERK

No. 94-1592

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,
v.
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*
and
FEDERICO PENA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE PETITIONERS

Of Counsel:

HAROLD A. ROSS
General Counsel
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

CLINTON J. MILLER, III
General Counsel
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

LAWRENCE M. MANN *
ALPER & MANN, P.C.
400 N. Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191
Counsel for Petitioners

October 20, 1995

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE RESPONDENTS ARE MISLEADING THE COURT IN STATING THAT AN EMPLOYEE IS FINALLY RELEASED FROM DUTY PRIOR TO DEADHEAD TRANSPORTATION	3
II. WAITING FOR DEADHEAD TRANSPORTATION CONSTITUTES "INTERIM PERIODS AVAILABLE FOR REST"	7
III. THE STATUTE MUST BE READ IN ITS ENTIRETY, RATHER THAN PIECEMEAL, IN DECIDING WHETHER TIME WAITING FOR DEADHEAD TRANSPORTATION IS TIME ON DUTY	8
IV. BOTH THE DOT AND THE RAILROADS HAVE IGNORED THE IMPACT OF CUMULATIVE FATIGUE OF RAILROAD WORKERS	10
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	4a
APPENDIX C	5a
APPENDIX D	7a
APPENDIX E	8a
APPENDIX F	9a

TABLE OF AUTHORITIES

Cases	Page
American Trucking Association, Inc. v. Atchison, Topeka and Santa Fe R.R., 387 U.S. 397 (1967)	4
Brecht v. Abrahamson, 113 S.Ct. 1710 (1993)	4
Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988)	4
United States v. Pennsylvania R.R., 275 F.Supp. 345 (W.D. Pa. 1967)	3
U.S. v. Price, 361 U.S. 304 (1960)	4
Statute	
Hours of Service Act	
49 U.S.C. § 21103(b) (1)	3
49 U.S.C. § 21103(b) (2)	9
49 U.S.C. § 21103(b) (3)	9
49 U.S.C. § 21103(b) (4)	4, 9
49 U.S.C. § 21103(b) (5)	7, 8
49 U.S.C. § 21103(b) (6)	7
Federal Regulation	
Title 49 C.F.R. Part 217	5
Legislative Matters	
Hearings on H.R. 8449, 84, and H.R. 9515 Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 2 (1969)	8
Hearings on Railroad Safety Programs (Part 2), Before the House Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, 102nd Cong., 2d Sess. 40-42 (1992)	11
Miscellaneous	
Atchison Topeka & Santa Fe Railway Company's System General Orders covering hours of service (paragraph 76)	4, 1a-3a
Burlington Northern General Order No. 4 on the Galesburg Division, dated 4/2/95	5, 4a
Burlington Northern General Order No. 9 on the Galesburg Division, dated 5/16/95	6, 8a

TABLE OF AUTHORITIES—Continued

	Page
Burlington Northern, Superintendent Notice No. 30 dated 8/24/95	6, 7a
Letter dated June 17, 1980 to Lawrence M. Mann from Michael T. Haley, and Letter dated May 7, 1980, to Raymond Johnson from Lawrence M. Mann	7, 9a-12a
Union Pacific Railroad Hours Of Service Department Reference Guide	5a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1592

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, *et al.*
and
FEDERICO PENA, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE PETITIONERS

We submit that for the Court to rule in favor of the Respondents [1] it will need to reach such exclusion by:

1. Excluding some of the express statutory language relating to interim rest periods, commingled service, and the point at which an employee is finally released from duty.
2. Giving the safety statute a strict interpretation, rather than a broad meaning in light of its humane purpose as intended by Congress.
3. Not acknowledging that an employee is not "finally released" from duty until he/she reaches the designated terminal after deadhead transportation has occurred.

---

[1] The federal respondents will sometime be referred to as "FRA", and the railroad respondents will be referred to as "Railroads".

4. Not giving adequate weight to the serious safety implications.
5. Assuming a worker's fatigue ends at the completion of 12 hours of work and has no impact on a subsequent work day, and irrespective of the regularity of the next work cycle and cumulative fatigue.
6. Not accepting the concept behind the HSA [2] that all time is time on duty unless specifically excluded.

In this reply brief, we will discuss, as relevant, the specific sections of the HSA that Respondents challenged.

First, there are areas where there appears to be agreement between the Petitioners and at least one of the Respondents. These are:

1. In determining whether waiting time is included within "time spent in deadhead transportation," the Court should not view that phrase in isolation. It should consider it in context, looking "to the provisions of the whole law, and to its object and policy." (Fed. Br. 16).[3]
2. The overriding purpose of the HSA is "to promote safety in operating trains by preventing the excessive mental and physical strain which usually results from remaining too long at an exacting task." (Fed. Br. 17).
3. If crew members awaiting deadhead transportation are obliged to perform any duties for the railroad during that time—including such relatively passive duties as observing passing trains for unsafe conditions, protecting the train from vandalism, or communicating information about the train via radio—they will be considered to be on duty. (Fed. Br. 25).

[2] "HSA" is the Hours Of Service Act.

[3] "Fed. Br." refers to the Brief of Federal Respondents.

4. *United States v. Pennsylvania R.R.*, 275 F.Supp. 345 (W.D. Pa. 1967) was correctly decided under the pre-1969 statutory scheme. (Fed. Br. 31 fn. 26).

In virtually each section discussed by the Respondents, they seek to restrict its scope and coverage to only a partial work day encountered by a railroad worker. The overriding focus of their arguments is that each section should be read to encompass various exclusions.

I. THE RESPONDENTS ARE MISLEADING THE COURT IN STATING THAT AN EMPLOYEE IS FINALLY RELEASED FROM DUTY PRIOR TO DEADHEAD TRANSPORTATION.

Application of 49 U.S.C. § 21103(b)(1)

The FRA attempts to refute the Petitioners' argument (Pet. Initial Br. 15) that the time on duty ends when the employee is *finally released* from duty. The FRA reasons that it is more logical that the employee is finally released from duty at the point at which he/she is finally relieved of responsibility to perform *operational* services for the railroad. It suggests that such point precedes rather than follows the deadhead transportation at issue here. (Fed. Br. 22-23; see also R.R. Br. 18-19).[4,5] The

[4] "R.R. Br." refers to the Brief of the railroads.

[5] The railroads are seeking to have the Court draw an inference from the fact that the petitioners unsuccessfully sought legislative changes to the HSA subsequent to 1969 to deal with the issue here and to reduce the maximum hours of work. (R.R. Br. 11-12, 28, 30, 36). As should be obvious to the railroads, who appear before Congress on a regular basis, there are various reasons why legislation is proposed and just as many different reasons why legislation may not be adopted. If the Court drew the inference sought by the railroads here, it would prevent persons from ever seeking helpful clarification of statutes by Congress. Literally thousands of bills and amendments are proposed in Congress annually. Failure of Congress to affirmatively act

railroads state that once the railroad instructs an employee to cease all duties, the employee has then been finally released from duty regardless of whether the train has reached a terminal. The plain reading of section 21103(b)(4) shows that deadhead transportation from a duty assignment ends at the *place of final release*. That place of final release cannot be located at a point before deadhead transportation begins or (b)(4) would make no logical sense.

The Court need only to look, as an example, at the Atchison, Topeka & Santa Fe Railway Company's System General Orders covering hours of service (paragraph 76) which unequivocally states that the point of *final release* does not occur until *after* deadhead transportation.

> (B) If transportation is not available upon expiration of 12 hours on duty, the ruling requires that we report all time spent awaiting the arrival of transportation at the point where a crew has been on duty for 12 hours. This means that if the vehicle or train to be utilized to transport the crew *to the point of final release* has not arrived when 12 hours on duty time has elapsed, the amount of time spent awaiting the arrival of such transportation must be reported as excess time on duty. It does not require a report of the time spent in actually transporting the crew to point of final release once the transportation has arrived in the field.

---

should not be tantamount to Congressional intent, either for or against a measure, just as no inference may be drawn from a denial of a petition for a writ of certiorari by the Court. The Court has addressed this point by stating that as a general matter it is "reluctant to draw inferences from Congress' failure to act." *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1719 (1993); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *American Trucking Association, Inc. v. Atchison, Topeka and Santa Fe R.R.*, 387 U.S. 397, 416-418 (1967); *U.S. v. Price*, 361 U.S. 304, 312 (1960).

> In cases where it is anticipated that you will be unable to reach your final destination prior to being on duty 12 hours, it is the conductor's or engine foreman's responsibility to notify the train dispatcher or other appropriate supervisor on a timely basis in order that arrangements can be made for a relief crew as well as transportation to the *point of final release*.
>
> If transportation is not available at the expiration of 12 hours on duty, the conductor must advise the train dispatcher of this fact in order that proper investigation and reporting of the excess service can be completed.
>
> Employees should indicate on their trip tickets the actual time they went on duty. Their "total time on duty" should be the actual time on duty, and if die [sic] under the Hours of Service Law, time in this field should be until transportation first becomes available. After transportation first becomes available and until employees actually go off duty should be reflected in the "time went off duty" field.[6]
>
> App. 1a-3a (Italics Added).

Burlington Northern also clarifies that the final release does not occur until after deadhead transportation. For example General Order No. 4 on the Galesburg Division states:

> Time spent in deadhead transportation to the point of final release is not counted as on duty, or off duty.
>
> (App. 4a)

---

[6] The Court may take judicial notice of the operating rules, timetables, and timetable instructions of the railroads because they are required to be filed with the Federal Railroad Administration pursuant to Title 49 C.F.R. Part 217. The said System General Orders were issued subsequent to the Ninth Circuit decision. However, that has absolutely no import regarding the railroads instructions as to where the point of final release occurs.

Similarly, the Union Pacific Railroad hours of service instructions to employees distinguish the time the employee stops operating the train and the *final* tie up time. (See App. 5a-6a).

Furthermore, both respondents are misleading the Court, in stating that there are no functions to be performed by the employee after the deadhead transportation. The fact is that there are at least some ministerial duties that are required of a crew after deadhead transportation, including the notification by them to crew dispatchers regarding the beginning of the hours of service rest period and completing time slip information total hours for pay purposes. We are unaware of any railroad that doesn't require at least some duty to be performed at the point of final release, the designated terminal. A train delay report notice of Burlington Northern, Superintendent Notice No. 30 dated 8/24/95 states:

> Crews arriving at final terminal must deliver Train Delay Report to depot for confirmation of on line car spots and crew tie-up. This includes but not limited to crews dead of Hours of Service.
>
> (App. 7a).

The Burlington Northern also spells out in some detail what must be done at the end of each tour of duty. In General Order 9 it is mandated that wheel reports and switch lists must be submitted to a clerk or agent at the end of each tour of duty. If the station or terminal has transferred freight and yard office functions, then the information must be faxed. After faxing wheel reports and switch lists, the conductor or switch foreman must call the appropriate clerk to verify that all of the above information have been received. (See App. 8a).

We submit that it is irrefutably clear that the employee is not finally released until after the deadhead transportation is concluded and where the employee finally completes other duties at the designated terminal.

II. WAITING FOR DEADHEAD TRANSPORTATION CONSTITUTES "INTERIM PERIODS AVAILABLE FOR REST".

Application of 49 U.S.C. § 21103(b)(5) & (6)

Both the federal and the railroad respondents argue that the *interim* rest period coverage should be restricted to the period only before a crew actually resumes further *operational duties* (Fed. Br. 20-21; R.R. Br. 16-17). As we previously discussed, an employee may be completely at rest during *any* interim period before being finally released, which is time on duty under the HSA. (Pet. Initial Br. 8-9, 11, 14, 16, 28-29). Here, again, respondents would curtail the applicability of this subsection because they state that the waiting time is not performance of service for the railroad. (Fed. Br. 21-22; R.R. Br. 17). One of the basic principles further supporting our position is that the train crew remains as the crew of the train until finally released from duty at the designated terminal. One does not cease to be a member of the crew, even if temporarily relieved, because the crew is not yet free to begin uninterrupted rest as required by the HSA.

Waiting time is part and parcel of an employee's work day. It occurs because of a situation completely within the railroad's control—its failure to provide a replacement crew in a timely manner, which in some instances require a crew to wait up to 10 hours for deadhead transportation. (See Pet. Initial Br. 7). The FRA has recognized that interim periods available for rest comprehend all time that an employee is in the service of the carrier. It was pointed out in a letter dated June 17, 1980, to the undersigned attorney of record from the Acting Chief Counsel of FRA, that an employee who is called to work from the home terminal to an away-from-home terminal, with the expectation that the employee will be utilized on a return assignment, is in the service of the carrier until his return home. (See App. 9a-12a). The question raised

in the letter concerned interim periods available for rest at terminals and at locations other than terminals. We submit that the interpretation by FRA flies directly in the face of its argument here. The fact is no matter how much the FRA and the railroads protest, an employee is not finally released until he/she reaches the final terminal. See this Brief *supra* at 3-6.

Also, regarding the 1969 hearings testimony[7], the railroads attempt to limit the testimony of their own witnesses. (See R.R. Br. 26-27). While Mr. Manion, the Vice President of the Association of the American Railroads, was testifying about deadhead transportation, he also discussed interim periods available for rest at other than a designated terminal. (See Pet. Initial Br. 20-21). One of these was Section 1(b)(3)(A) of H.R. 8449. This section was the relevant section of the hours of service bill under consideration relating to interim periods for rest. It is codified at 49 U.S.C. § 21103(b)(5) almost verbatim. (*See Hearings on H.R. 8449, H.R. 84, and H.R. 9515 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., Sess. 2 (1969)). From his testimony Mr. Manion obviously was aware that more than one section of the proposed legislation would require that time waiting for deadhead transportation would be considered time on duty, if enacted as the bill was introduced.

III. THE STATUTE MUST BE READ IN ITS ENTIRETY, RATHER THAN PIECEMEAL, IN DECIDING WHETHER TIME WAITING FOR DEADHEAD TRANSPORTATION IS TIME ON DUTY.

As we pointed out in our initial brief (*see* Pet. Initial Br. 17) the fallacy of the Seventh Circuit, in concluding

[7] We acknowledge that the Brotherhood of Locomotive Engineers was not a member of the Railway Labor Executives' Association at the time of the 1969 Hearing on Hours of Service. The union became a member in February 1970. We apologize for the error in the initial brief.

that time waiting for deadhead transportation is not time on duty, is that it focused solely on one section of the Act. All provisions of a statute are intended to have meaning and are to be given effect. (*Id.*). The respondents are following the path of the Seventh Circuit in arguing that the time waiting for deadhead transportation is part and parcel of deahdead transportation. The FRA states that although *transportation* connotes motion, it may be understood to encompass incidental activities that do not themselves involve movement, but are prerequisites to its occurrence. (See Fed. Br. 15). The FRA further contends that the 1969 Senate Report, discussing deadhead transportation to a duty assignment, lends credence to its agreement that deadhead transportation encompasses incidental activities such as waiting time. What the FRA fails to recognize is that Congress did take into consideration incidental activities in 49 U.S.C. § 21103 (b)(2) & (3). The time on duty includes the time the employee is engaged *in or connected with* the movement of the train and time spent in any other service in which the employee is engaged *in or connected with the movement of a train*. Had Congress intended to include the incidental activity of waiting time to be included in deadhead transportation it would have added the words *or conected with* to Title 49 U.S.C. § 21103(b)(4), and that section would have read *time spent in or connected with deadhead transportation*.

The railroads argue that they will face operational difficulties if the Seventh Circuit is reversed. In fact, the alleged operational difficulties that will result are exactly the same as they were presented to Congress in 1969. (See 1969 Hearings at 135 and 199) (see R.R. Br. 26), except that Congress did not agree with the railroads. The railroads say that they could no longer relieve a crew at 11 hours and 59 minutes if waiting time were to be considered as time on duty. That is only partially correct. If deadhead transportation were available and waiting for the crew, the railroad could relieve the

crew legally. Moreover, there is no necessity to work crew members the full 12 hours. Congress set the absolute maximum that a crew could be worked. Also, each major carrier in this country has computer operations and intricate signal systems by which they can determine the location of a crew at almost any point, if they so choose. In almost all instances a railroad could provide for deadhead transportation to be available upon arrival of a train at a certain location.

IV. BOTH THE DOT AND THE RAILROADS HAVE IGNORED THE IMPACT OF CUMULATIVE FATIGUE OF RAILROAD WORKERS.

Both the FRA (Fed. Br. 21) and the railroads (R.R. Br. 14) state that fatigue following train operations poses no danger because the worker is not going to operate the train anymore during that particular tour of duty. We submit that the Respondents are simply putting blinders over their eyes for the sole purpose of trying to justify their arguments in this case. As pointed out in our initial brief (Pet. Initial Br. 29-37), fatigue resulting from irregularity and unpredictability of work hours is a very serious problem in the railroad industry. This safety problem does not conclude each day at the end of an employee's 12 hours of work. It cumulates from day to day. As succinctly stated in testimony of Susan M. Coughlin,[8] then Acting Chairman of the National Transportation Safety Board, in hearings before the House Subcommittee on Transportation and Hazardous Materials regarding the Hours of Service Act, June 10, 1992:

> Between 1986 and 1992 alone, the Safety Board investigated 643 railroad accidents. Human performance factors played a role in 72% of those accidents, and in many cases work/rest issues and fatigue were the causal factors. . . .
>
> . . . .

[8] Prior to becoming a member of the NTSB, Ms. Coughlin was the Deputy Administrator for the Federal Railroad Administration.

> Complicating the unpredictable work schedule, today's crews face increased demands as they are operating trains at higher speeds, over longer distances, and with shorter effective intervals between tours of duty. Smaller crews are operating longer trains on fewer miles of track than existed 20 years ago. As a result, heavier trains are traveling closer together in a more congested environment. These increasingly stringent operating parameters have added stress to the work environment. We don't see this trend changing. Indeed, the demands on crews, dispatchers, and maintenance workers have increased, and as the volume of rail business increases, these demands are likely to increase as well. For these reasons, management and labor must continue to recognize and respond to the effects these changes have on safety. . . . As a result, the *Safety Board has found work load and work/rest issues to be critical factors in accident after accident.* We have completed the investigation of 12 accidents between 1987 and 1991 that involved railroad employees' inattention because of fatigue, and probably sleeping, while on duty—all had crews who had complied with the protector of safety, the Hours of Service Act, in place. . . . (Emphasis added).

Hearings on Railroad Safety Programs (Part 2), Before the House Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, 102nd Cong., 2d Sess. 40-42 (1992).

The FRA at p. 30 attempts to discredit the Ninth Circuit decision.[9] That court treated as pivotal the purported

[9] Both the Federal Respondents and the railroads attempt to disregard everything that precedes the matters before the Seventh Circuit. They want this Court to assume that the facts discovered in the Ninth Circuit litigation do not exist and/or those facts are not relevant here. That simply is not the case. The operating conditions have not changed significantly since the initiation of the litigation in Oregon, and hours of service issues cannot be so cavalierly disregarded. It is a nationwide matter and the attempts

lack of Congressional intent to change the established rule regarding the treatment of waiting time. In contrast, FRA states that the Seventh Circuit accepted the contention that Congress in 1969 had reason to know that waiting time was never treated as on duty time. Yet in the same breath it points out that Congress is presumed to be aware of judicial decisions or administrative interpretations of existing laws. It is curious that the FRA tried to discount the fact that the Government initiated the *U.S. v. Pennsylvania R.R.* case decided in 1967 on this exact point. Furthermore, the FRA acknowledged that the *Pennsylvania R.R.* case was correctly decided under the pre-1969 statutory scheme. (See Fed. Br. 31 fn. 26). Congress, in 1969, as correctly pointed out by the Ninth Circuit, did not change any of the law that was considered to be time *off* duty. It merely added to the situations in which certain time between going on duty and being finally released from duty would be considered time on duty, with the one exception of *traveling in* deadhead transportation being neither time on duty, nor time off duty.

---

by the Respondents to limit the relevant facts is not in the interest of safety. We understand why the Respondents do not want this Court to become aware of the operating rules of the railroads applicable to this issue, or to consider these conflicting determinations within the FRA regarding the issue before this Court.

The railroads criticized the petitioners for not filing a response to the railroads' petition to the FRA to reconsider its nationwide application of the Hours of Service Act subsequent to the Ninth Circuit decision. (See R.R. Br. 7, 9). As pointed out in FRA's statement of policy and interpretation of the railroads petition "Notice and comment procedures are unnecessary with regard to the general statement of policy and interpretation issued by this notice . . ." (J.A. 159). The railroads know there was no formal docket created when the railroads' petition was filed in that the railroads were seeking simply a different interpretation from the one that was previously issued. There was no need for the unions to respond because their views were well known at FRA, and any new filings would have duplicated what was already contained within the FRA's records.

In the 1969 amendments to the HSA, Congress did not narrow the meaning of time *on* duty (as suggested by Respondents). Rather in each instance it placed restrictions on the definition of time *off* duty. Congress in every change to the HSA strengthened the protections afforded railroad workers. For example, deadhead transportation had been previously considered time *off* duty. Congress redefined it by treating some travel as *on* duty, and some as limbo time (neither *on* nor *off* duty). In treating interim periods of rest, which was previously considered time *off* duty, the amendments defined this as time *on* duty. There is not one aspect of the 1969 amendments which suggests that any time previously considered time *on* duty was converted to time *off* duty, or were protections weakened in any way. In fact, Congress only strengthened the protections for the employees.

CONCLUSION

For all of the aforesaid reasons, the decision of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

Of Counsel:
HAROLD A. ROSS
General Counsel
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

CLINTON J. MILLER, III
General Counsel
UNITED TRANSPORTATION UNION
14600 Detroit Avenue
Cleveland, Ohio 44107
(216) 228-9400

LAWRENCE M. MANN *
ALPER & MANN, P.C.
400 N. Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191
Counsel for Petitioners

October 20, 1995

* Counsel of Record

APPENDICES

APPENDIX A

THE ATCHISON, TOPEKA & SANTA FE RAILWAY

SYSTEM GENERAL ORDERS

1995

* * * *

76. HOURS OF SERVICE

(A) . . . .

(B) If transportation is not available upon expiration of 12 hours on duty, the ruling requires that we report all time spent awaiting the arrival of transportation at the point where a crew has been on duty for 12 hours. This means that if the vehicle or train to be utilized to transport the crew to the point of final release has not arrived when 12 hours on duty time has elapsed, the amount of time spent awaiting the arrival of such transportation must be reported as excess time on duty. It does not require a report of the time spent in actually transporting the crew to point of final release once the transportation has arrived in the field.

In cases where it is anticipated that you will be unable to reach your final destination prior to being on duty 12 hours, it is the conductor's or engine foreman's responsibility to notify the train dispatcher or other appropriate supervisor on a timely basis in order that arrangements can be made for a relief crew as well as transportation to the point of final release.

If transportation is not available at the expiration of 12 hours on duty, the conductor must advise the train dispatcher of this fact in order that proper investigation and reporting of the excess service can be completed.

Employees should indicate on their trip tickets the actual time they went on duty. Their "total time on duty" should be the actual time on duty, and if die [sic] under the Hours of Service Law, time in this field should be until transportation first becomes available. After transportation first

becomes available and until employees actually go off duty should be reflected in the "time went off duty" field.

* * * *

APPENDIX B

BURLINGTON NORTHERN RAILROAD

GENERAL ORDER NO. 4

Division Galesburg

Subdivision All

Date 4/2/95

The conductor is responsible for completing the appropriate parts of the delay report at the time they are accomplished. In situations where the conductor deadheads to the point of final release, the final off duty time must be filled in upon arrival and faxed to the proper office in order for the Burlington Northern to determine when the conductor can be next called for duty. Time spent in deadhead transportation to the point of final release is not counted as on duty or off duty deadhead.

General Orders in effect: 1 through 4.

APPENDIX C

UNION PACIFIC RAILROAD
HOURS OF SERVICE DEPARTMENT
850 JONES ST., OMAHA, NE 68102-2920

PLEASE READ AND KEEP THIS REFERENCE GUIDE FOR CORRECT TIE-UP PROCEDURE EFFECTIVE 3/6/95:

IF YOU NEED FURTHER INFORMATION, PLEASE CALL 1-800-877-0309, PUSH YOUR NORMAL OPTION AT THE PROMPT AND ASK THE SUPERVISOR WHO ANSWERS TO TRANSFER YOU TO EXTENSION 7364 OR, FROM A COMPANY PHONE, DIAL 8-636-7364.

1. *EFFECTIVE 3/6/95, FRA REGULATIONS SAY THAT HOURS OF SERVICE TIME DOES NOT STOP UNTIL YOU ARE RELIEVED OF RESPONSIBILITY FOR THE TRAIN.* (NOTE: THIS DOES NOT APPLY IN THE WESTERN STATES OF CA, OR, WA, NV, ID & MT)

2. WHEN USING THE =TE FUNCTION IN THE COMPUTER PLEASE CORRECTLY FURNISH BOTH THE "ODT" AND "FTU" TIMES AS SHOWN BELOW. REMEMBER, THEY CAN NEVER BE THE SAME, AS EVEN WHEN WALKING IN IT TAKES SEVERAL MINUTES TO GET TO THE TIE-UP POINT.

3. *IF YOU HAVE TO CALL IN YOUR TIE-UP TO CMS OR A TIE-UP RECORDER, PLEASE SPECIFY WHAT TIME BOTH ODT & FTU ARE TO READ.*

4. *"ODT" IS THE TIME YOU WERE RELIEVED OF RESPONSIBILITY FOR THE TRAIN.* THIS FIELD IS A FRA FIELD WHICH STANDS FOR "OFF DUTY TIME FOR HOURS OF SERVICE PURPOSES ONLY" AND DOES NOT EFFECT YOUR PAY OR WHEN YOUR REST STARTS. IT'S ONLY PURPOSE

IS TO TELL THE FRA WHAT TIME YOU WERE RELIEVED OF RESPONSIBILITY FOR THE TRAIN, AND HOW MANY HOURS REST YOU GET. THIS TIME IS REQUIRED BY FEDERAL LAW. (NOTE: PER COURT RULING 3/6/95, THIS IS THE TIME YOU STOP OPERATING THE TRAIN AND *IS NOT* THE TIME TRANSPORTATION PICKS YOU UP.)

5. *"FTU" IS YOUR FINAL TIE UP TIME.* IT IS THE TIME YOU LEAVE THE TIE-UP POINT FOR HOME. IT STOPS YOUR PAY AND STARTS YOUR REST.

6. "P/U CIRC7"—MAKE SURE YOU PUT A "Y" IN "WAS CREW TRANSPORTED TO FINAL TIE-UP POINT", (DO THIS EVEN IF YOU WALK IN). THIS BRINGS UP ANOTHER SCREEN IN WHICH YOU ENTER THE CIRC-7 OF THE POINT YOU WERE PICKED UP. IF NO CIRC-7 EXISTS FOR THAT LOCATION, PLEASE ENTER IN THIS FIELD THE CIRC-7 YOU LAST PASSED THRU BEFORE GOING DEAD. THEN ENTER THE MODE OF TRANSPORTATION (IF YOU WALKED IN, TYPE "WALKED IN" IN THE COMMENT FIELD) AND THE TIME YOU REACHED FINAL DESTINATION BY THIS TRANSPORTATION.

FOLLOWING THE ABOVE PROCEDURES WILL RESULT IN LESS INSTANCES OF INACCURATE REPORTING OF HOURS OF SERVICE VIOLATIONS TO THE FRA.

APPENDIX D

BURLINGTON NORTHERN RAILROAD

SUPERINTENDENT NOTICE NO. 30

DIVISION: Willmar

Subdivision: All

Division Superintendent: R. C. Ellis

Notice in Effect: 1-18, 20-22, 24-30

Notices Cancelled:

Date: 08-24-95

SUBJECT: TRAIN DELAY REPORTS

Crews arriving at final terminal must deliver Train Delay Report to depot for confirmation of on line car spots and crew tie-up.

This includes but not limited to crews dead of Hours of Service.

APPENDIX E

BURLINGTON NORTHERN RAILROAD

GENERAL ORDER NO. 9

Division Galesburg

Subdivision All

Date 05/16/95

All Locations

* * * *

Wheel reports and switch lists must be submitted to a clerk or agent at the end of each tour of duty. If a station or terminal has transferred freight and yard office functions to a centralized agency center, for example, Ft. Worth Customer Support Center, conductors and switch foremen must fax all accurately documented wheel reports and switch lists to that Customer Support Center. After faxing wheel reports and switch lists, the conductor or switch foreman must call the designated clerk or specialist that provides service for your respective division or terminal in order to certify that all lists have been received, are legible, and have been completed properly. This information is necessary to maintain expedient service to our customers, maintain proper records for car movement, and to support billing charges due BN.

Signature indicating that conductor or switch foreman has performed the work and has entered and completed the information, as required, above, on wheel reports and/or switch lists (including work that was left undone).

* * * *

APPENDIX F

[DOT Logo]

Office of
the Chief Counsel

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
Washington, D.C. 20590

[Jun. 17, 1980]

Lawrence M. Mann, Esq.
Alper, Schoene, Horkan & Mann
818 Eighteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Mann:

This will respond to your letter of May 7, 1980, concerning interim periods of release under the Hours of Service Act, as amended. We have reviewed the instructions quoted in your letter and find them to be inconsistent with the requirements of the Act.

One of the purposes of the Act is to assure that employees receive release periods under circumstances that are reasonably conducive to meaningful rest. Read in that light and in light of congressional hearings and debates that layed the foundation for the 1969 amendments to the Act, the term "interim periods available for rest" clearly comprehends statutory periods of release of eight or ten hours provided while an employee is in the service of the carrier. Just as clearly, a employee who is called to work from the home terminal to an away-from-home terminal, with the expectation that the employee will be utilized on a return assignment, is in the service of the carrier until his return home. Whether or not the employee is entitled to compensation for that period, and whatever its duration in excess of four hours, such a release is an "interim release" between periods of covered service. Any such release may be provided at a place other than a

designated terminal only if one of the statutory exceptions is satisfied.

The necessity of this conclusion can be demonstrated by example. If the "designated terminal" provision may be evaded by providing release periods of eight or ten hours, such release periods may be provided at any place the railroad chooses. A train crew in through freight service could be "released" at any siding on the line of haul. Under this rationale, the absence of facilities for food and lodging would be no bar to returning the crew to service for a full twelve-hour period after eight or ten hours in a caboose or locomotive cab. Obviously, it is precisely such abuses that resulted in enactment of the present statutory restrictions.

Sincerely,

/s/ Michael T. Haley
MICHAEL T. HALEY
Acting Chief Counsel

Law Offices
ALPER, SCHOENE, HORKAN & MANN
818 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 298-9191

May 7, 1980

Raymond James
Chief Counsel
Federal Railroad Administration
400 7th Street, S.W.
Washington, D.C.

Dear Mr. James:

My clients have been advised that a certain railroad has released the following instructions to its operating officers:

> "Regarding tying up train and engine crews on Hours of Service Law other than designated terminals.
>
> "The Hours of Service Act is rather convoluted, but the relevant position of the statute presently reads as follows:
>
> "3. Time on duty shall commence when an employee reports for duty and terminates when the employee is finally released from duty, and shall include:
>
> "(A) Interim periods available for rest at other than a designated terminal.
>
> "This language was added to the Act in 1969; it was unaffected by the 1978 amendment defining 'designated terminal'.
>
> "The statute contains no definition whatsoever of when an employee is 'finally released from duty'. The entire issue of designated terminal is material only to whether a period of 'interim rest' is counted

as time on duty. The structure of the statute shows that interim refers to periods between reporting for duty and final release.

"Strictly speaking, nothing in the Hours of Service Act precludes giving employees their final release for ten hours at a point other than a designated terminal, even though we may expect a challenge to this interpretation from certain individuals and organizations.

"Therefore, you may amend your current practice and tie up a crew for a full ten-hour rest at other than home or away-from-home terminals when the crew had 'died on the law' provided suitable eating and lodging facilities are available."

My question is whether or not the last sentence as quoted above in the opinion of FRA violates the Hours of Service Act.

It is my understanding that the said carrier has put the above instructions into effect. Therefore, your prompt attention to this issue would be appreciated.

Very truly yours,

/s/ Lawrence M. Mann
LAWRENCE M. MANN

cc: J. R. Snyder
J. L. Easley